No. 1384

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EASTERN AND WESTERN LUMBER COMPANY,
Plaintiff in Error,

vs.

PETER A. RAYLEY,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the District of Oregon

Brief of Defendant in Error.

THOS. O'DAY,
Attorney for Defendant in Error.

THE BRIEFLET.

No. 1384

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EASTERN AND WESTERN LUMBER COMPANY,
Plaintiff in Error,

vs.

PETER A. RAYLEY,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the District of Oregon

Brief of Defendant in Error.

THOS. O'DAY,
Attorney for Defendant in Error.

THE BRIEFLET.

STATEMENT.

This is an action by Peter A. Rayley, whom for convenience I shall refer to as the plaintiff, against the plaintiff in error, whom I shall refer to in this Brief as the defendant. The defendant is a saw mill company and has large logging interests in the State of Washington, where it was, at the time of the accident complained of herein, operating a steam railroad some 11 miles or more from Columbia River back into the timber. It had a large number of cars, three or four engines, employed 150 or more men. In order to get the logs from the timber down to the river, they are loaded on cars or trucks, and the train on which the plaintiff was injured consisted of seven trucks, or seven sets of cars, and an engine of some 30 or 40 tons weight. There were steep grades on this road, and there were no steam brakes on the cars or trucks, but there was a steam brake on the engine. The defendant had constructed a part of its road by laying down skids or mud sills, which consisted of trees some 20 inches in diameter; upon these sills were placed ties. These sills were some of them 30 or 40 feet in length. On the day of the injury the plaintiff was on this engine as a fireman, and the engine went through the track, turned over, and he was caught under the engine and was very badly injured; he lost his leg, was badly scalded, his back was injured, besides the internal injuries which appear in the testimony. The cause of this engine

going through the track was on account of very defective and grossly negligent construction of this road. As stated before, these sills were laid down and the ties put across them, and these rails laid upon these ties. The ties that were laid down were old, having been taken up from another road that had been constructed and abandoned. They were placed 16 inches apart, and the rail was laid upon them so that it did not come directly over the sill or stringer upon which the tie was laid, but was laid about one foot inside of this stringer, so that it broke when the engine came upon it. In addition to its weight, the engine was holding seven sets of loaded trucks, and the ties broke and let the engine down through the track, and it tipped over. These ties were so rotten that some of the witnesses said they could take them up and pick them to pieces with their hands. In addition to their being rotten, they were spike-driven; and yet, notwithstanding this condition of the ties, the defendant constructed this road and undertook to haul thereupon heavy log trains.

The defendant in constructing the road acted apparently in absolute disregard of human life. There was a trial and a verdict for the plaintiff for the sum of $9,250. The question of plaintiff's employment as a fireman, which was denied, was especially submitted to the jury by the court, and the jury returned a special verdict thereupon especially finding that the plaintiff was in the de-

fendant's employ at the time named in the capacity of a fireman on its engine on its said railroad.

FRANK ENYART (Record, page 124) describes the manner of construction, and says:

"In place of these stringers being mortised together at the ends, like they should be, the stringers were laid along side by side, like that; and the ties were laid across, where the rail would come upon this stringer, and in place of it being put under so the rail could continue and go right over the stringer, the rail ran off of the stringer, and was just on the ties, until it come to the next stringer; this space clear to the next stringer, that the rail wasn't over the stringer; it was on the ties, but not over the stringer."

Q. Now at this particular point, where this engine went through, how far was the rail inside that stringer?

A. Well, there's places that the rail was probably eight inches and a foot, and then it was run down to six inches and four inches along.

Page 126. He describes the ties, saying:

"Why, they were rotten. The ties were rotten, so rotten that you could take your hand, that way, and shove the rotten wood off the bottom of the ties, where they had been on the ground before."

Speaking of these stringers that were so lapped on the ends and passed each other, he says (page 126): "Of course, at the butt end probably they would be 24 or 26 inches."

GEORGE H. MORRIS (Record, pages 136, 137, 138) says:

In speaking of the distance the rail was inside the stringer, he was asked:

Q. How far would you say?

A. Well, I would judge it would be between six and ten inches.

Speaking of the ties: "Why, they were broken and old ties and spike-driven."

(Page 139.) He says that he was over this track the day before with a donkey engine, and in regard thereto he says: "It looked very weak; we hardly thought we would get over it with the donkey."

GEORGE SIMMONS (Record, page 142). He says: "Yes, the rail was inside the stringer about eight inches, I guess."

Speaking of the ties, he says: "Well, they were rotten and had been spike-driven, too."

D. E. CHAMBERLAIN also says (Record, page 144), in regard to the way the rail was laid: "It was laid about eight or twelve inches to one side of the stringer."

Q. Inside the stringer?

A. To the inside of the stringer.

In regard to this he was asked what the condition of the ties were there.

"They apparently looked good on the outside, but they were rotten on the inside."

The above is the evidence of some of the plaintiff's witnesses, but the defendant, through its vice-

president, M. F. Henderson (Record, page 228), testified:

M. F. HENDERSON:

Q. Mr. Henderson, you had charge of the camp down there generally, at the time of this accident complained of?

A. Yes, sir.

And it was stated (Record, page 229) by counsel for defendant:

"And as a matter of fact, Mr. Stewart and all of the men there were under Mr. Henderson." Mr. Stewart referred to was the general superintendent, but he was under Mr. Henderson, who was described in the statement of counsel (Record, page 229) as "one of the owners of the camp."

Mr. Henderson testifies that in the construction of this road (Record, page 231), these sills or stringers were laid down so that they lapped sideways, and he further says, on same page: "I found the ties broken square off. I found no rot, but evidently the ties were brittle. The ties had been in use, I should judge, about four years, on the ground."

He was asked, at page 236, as follows:

Q. If those ties were laid down there so they went past, so it let that rail come eight inches inside of the stringer, with these ties that were there, that would be much weaker than if it were laid so that the rail came right on top of the stringer, wouldn't it?

A. It certainly would; yes, sir.

Q. And if this had been laid down there at that time so that the rail came on top of the stringer, this accident wouldn't have happened, would it?

A. No, sir; it would have stayed all right.

Q. The reason it did happen was because the rail was in the inside, and when the weight of the engine came on they broke through?

A. Evidently that was it.

Q. That was the cause of the accident?

A. No question about it.

Q. There is no doubt about which would have been the best way to build that, is there, Mr. Henderson?

A. We built all of our road just as that is built, and we operated it afterwards, and the road is still there, with the ties on, where the rail sat inside as much on the stringer as that did.

Q. Why did this break?

A. Simply because there were defective ties there.

Q. That is the fact, the ties were defective?

A. It couldn't have been otherwise; the ties broke.

The above is the statement of the vice-president, the practical owner, and the man in charge of the defendant's business.

At the time the plaintiff was injured he was a young man, 25 years of age, and had been to work for the defendant for something like a year before

that time, in the capacity of a stationary engineer, but on the day of the accident in question he was ordered by the superintendent, Mr. Stewart, to act as fireman on this engine. He had never been over the road. As a matter of fact, he had never seen it, as it had just been constructed, and I think this was the first time it had been used. It was either the first or second time an engine had ever gone over the track where the accident occurred.

ARGUMENT.

As to the first assignment of error, it seems to me it is sufficient to say that whether the question was leading or otherwise, it was a matter of the discretion of the trial court, and therefore was not error to allow the question to be answered. In any event, it was merely a restatement of what the witness had already testified to, without objection. In addition to that, the question was not leading, but was proper, and for that reason there was no error.

Second Assignment of Error. In regard to the second assignment of error, the witness answered the question by saying that there was nothing said about compensation, and whether there was any compensation or not was not material. The court submitted the question to the jury as to whether or not the witness was actually employed and acting as fireman. In fact, not only this witness, but Stew-

art, the superintendent, testified (page 334) as follows:

Q. Who was in charge of the locomotive on that day, on the morning of the accident?

A. Arthur Shepardson.

Q. Do you know, as a matter of fact, who was acting as fireman on the locomotive at that time?

A. Yes, sir; he was.

Q. How do you know?

A. Well, I had hired him for that purpose.

The superintendent was not asked and he did not state that he paid any extra compensation. On the contrary, he says that the reason for having the engineer do his own firing was to prevent any extra compensation. Record, page 336, he says:

"Well, I went into the cab; I had been thinking about it, and cutting down the expenses," and he also adds in this connection that this arrangement was made some time during the previous week, and on plaintiff's objection to the question the court especially held (Record, page 337):

Court: "I don't think it is material what arrangement he made at a previous time. This time, it would be important."

But the defendant refused to follow it up and make any inquiry of the superintendent as to compensation. I submit, however, that it was immaterial in any event, because, whether extra compensation was agreed upon or not, would not control. The question was, was he acting at that time

as fireman, and Arthur Shepardson himself in his evidence says (Record, page 157):

Q. I mean on that occasion, were you doing it under arrangement with the company?

A. Nothing special as to extra pay; no, sir.

It was immaterial whether he was paid extra or not. The question to be decided by the jury was as to whether plaintiff was actually acting as fireman, and all the testimony in that regard was allowed, and the jury specially found that he was so acting.

Third Assignment of Error. The question put to Dan Fahey was not whether plaintiff had made any application, but whether the engineer, Shepardson, had made any request for a fireman. This was clearly incompetent, and it was more so because the testimony shows affirmatively that Fahey was the woods foreman. It is true he says in his evidence that he was assistant to Stewart, superintendent, but the defendant shows affirmatively in this case that Henderson, the vice-president, and part owner, was there. That he had jurisdiction over Stewart, the superintendent, and everybody else. Now there was on the rollway Henderson, vice-president; Stewart, superintendent, and Fahey, the woods foreman, and it is very clearly evident that Fahey had authority only when the superintendent was not there. In any event, this evidence and the assignment of error is immaterial and frivolous.

Fourth Assignment of Error. Dr. Jefferds was called as a witness. It must be remembered that Jefferds was the physician retained in the employ of the defendant. I challenge the attention of the court to his testimony. The only thing that he could remember of the different and various conversations with the plaintiff was the declaration that he claimed was made by plaintiff that at the time of the accident he was on the engine merely to ride down the line. It is shown by his examination that he was not the physician of the plaintiff, but was employed by the defendant. It was claimed by the plaintiff that Dr. Jefferds was not an impartial witness. He attempted to get this case settled and tried to get the plaintiff to accept an artificial limb. He states in his testimony that he believed the plaintiff had no cause of action, judging as he says from the report he read in the papers. The plaintiff had a right to cross-examine this witness for the purpose of showing his interest and for the purpose of showing his bias, and for the purpose of showing that he was not impartial.

In 3 Ency. of Evidence, page 849, it is stated:

"Bias, Prejudice, Hostility, etc. A. Generally. For the purpose of attacking the credibility of a witness, great latitude is allowable on cross-examination, and questions may be asked which are wholly irrelevant to the matter in issue, in accordance with the rule. The general rule is that anything tending to show bias or prejudice on the part

of a witness, or anything which shows his friendship or enmity to either of the parties is commonly proper subject of inquiry. So, also, anything which tends to show that in the circumstances in which he is placed he has a strong temptation to swear falsely; the situation of the witness in regard to the result of the trial, his interest, whether as employee, surety on bond, reward for conviction, or otherwise, or inclinations, for or against either of the parties, may be shown. And at times it is also permissible to investigate the character, habits and mental condition of a witness, for the purpose of attacking his credibility.

"In short, inasmuch as the jurors are the sole judges of the credibility of witnesses, it is well established that whatever in the slightest degree affects the credibility of an opposing witness and will tend to assist the jurors in the judgment which they are to form upon that subject, ought not to be withheld from them."

This authority equally applies to Assignment 5.

Assignment Number Six. If there is any one thing that is settled in the Federal Courts, it is that the burden of proof is upon the defendant to show the assumption of risk. This is a rule of most of the state courts.

In the case of Dowd v. Railway, 170 N. Y. 459, quoting page 472, it is stated: "We think that the burden of showing that the servant assumed the risk of obvious danger rests upon the master."

To the same effect is Island Co. v. Tolson, 135 U. S. 551.

Railway v. Gladman, 15 Wall. 401.

Railway v. Horst, 93 U. S. 291.

Huff v. Railway, 100 U. S. 213.

N. P. Railway v. Mares, 123 U. S. 710.

In this case the defendant offered no testimony to show that the plaintiff assumed the risk, and if the rule were applicable in the Federal court, which it is not, that the jury might assume from the plaintiff's own testimony that he assumed the risk, there is no testimony, not even a scintilla of evidence, that the plaintiff knew that this road was defective. The evidence shows that the plaintiff had been running a donkey engine as an engineer. That had been his employment during the year 1904, and he was so employed by the defendant also during the year 1905. He went up to the camp on this particular day expecting to be employed in the same capacity. He states that he supposed, as they were making an extra run on that day and were attempting to break the Columbia River record, he would be required to run the donkey engine, and this claim on his behalf is borne out by the fact that the engineer of that engine, Ralph Adams, says (Record, page 306) that he commenced work at 12 o'clock that night, the night before the accident.

A. Yes, sir; I worked all night that night.

Q. At that engine?

A. At that engine.

Q. And you were working right along up to the time of this accident, were you?

A. I was working; yes, sir. I was at my place of work.

This engineer had therefore been up all night, the night before, and had been there working from 12 o'clock of the night of the day of the accident. The plaintiff says (Record, page 86):

"Well, I will tell you: I didn't know at the time if they was going to have two donkey engineers. The report was put out that one man wouldn't be able to stand with the donkey all day to make the big run. Well, I expected probably that they would put me on the donkey to help Ralph out."

The plaintiff knew nothing about this road. He did not build it. He had not even seen it, and even if he had seen it that would be no evidence that he knew its danger. A defense of this kind, namely, assumption of risk, is not made out by the mere fact that one sees the condition of affairs. He may see and not understand. It must be shown that he not only sees the danger, but it must be shown that he also appreciates the danger.

Mackey's Case, 157 U. S. 72.
Schmelling's Case, 79 F. 263.
Currier's Case, 108 F. 19.
Kane's Case, 128 U. S. 91.
N. P. Ry. v. Egeland, 163 U. S. 93.

In the case of Roth v. Northern Pacific Lumber Co. 18 Ore. 205, it is held that one in order to as-

sume a risk, must not only know the facts, but must appreciate the danger. "We have already adverted to the distinction that there may be knowledge of the existence of facts and total ignorance of the risk which they involved."

In Johnston v. Railway, 23 Ore. 94, it is said:

"An open and visible risk is such as would in an instant appeal to an intelligent person (Wood, Mast. and Serv. 763.) It is a risk upon which there could be no difference of opinion in the minds of intelligent persons."

There was no evidence in this case that the plaintiff assumed this risk. Therefore there was no issue of fact to be submitted to the jury. It would certainly be improper in any case for a court to submit an issue to the jury where there was absolutely no proof of any kind to sustain it. The mere fact that such an issue is in the pleadings does not entitle it to be submitted by the court in its charge to the jury. If it be not in the pleadings it cannot be submitted, even though the evidence were offered to sustain such an issue. On the other hand, if it be in the pleadings and there is no evidence to sustain it, it is a self-evident proposition that the issue should be withdrawn from the jury, because it would be as improper to submit an issue in the pleadings where there are no facts, as it would be to submit an issue where there were no pleadings. In other words, it is the duty of the court to decline the submission.

Rainey v. City of Lawrence, 79 Pac. 116 (Kan.)

Young v. O'Brien, 79 Pac. 211 (Wash.)

In the above first-named case, the court says:

"In the absence of any evidence that would justify a finding that plaintiff knew of the defect in the sidewalk, or by the exercise of ordinary diligence might have known of it, no issue was presented as to her actual or constructive knowledge of its existence, and no instruction should have been given as to the degree of care required of one using a walk with knowledge that it was defective. And as the matter was one of the utmost importance, under the circumstances of the case, the giving of such an instruction was prejudicial error, not merely because it tended to confuse the jury or distract attention from the real issue, but because it suggested, and by implication permitted, a verdict against plaintiff upon a theory not tenable under the evidence."

Seventh Assignment. It is difficult to understand what objection there is to this instruction, which in effect told the jury that it was the duty of the defendant to use ordinary care to make its road reasonably safe. The question was not whether the roadbed or track was temporary or otherwise, but whether it was a part of the defendant's equipment, used by the defendant in the transaction of its ordinary business of logging, and if it were such it was the duty of the defendant to use ordinary

care to make it reasonably safe for the purpose for which it was used. This certainly is a correct statement of the law. It would seem that this statement is so self-evident that the discussion of the same is superfluous.

In any event, the defendant by its request No. 15 (Record, 444), requested the court to say to the jury that even if the road were temporary that the defendant would "be required to construct and operate a road with ordinary care suitable for such purposes." Now the difference between the charge of the court and the request of the defendant is not a difference of ideas, but merely a difference of words. This road, whether it were temporary or otherwise, was being used to transport logs and logging trains. The plaintiff was injured on April 23, 1905.

Mr. Henderson, vice-president and general manager of the company, said that this road was used (Record, page 235):

Q. When do you say they got through there with that track?

A. Oh, I should judge a couple of months later, after the accident. I don't know just the exact time; I didn't call it up.

"You didn't get through till late in August, did you?"

"I don't recollect. I didn't keep track of it. It was after that time quite a while."

Again, at page 237, he was asked in regard to

the cause of this accident, and why the engine went through the track, and why the road gave way and let the engine through; he says as follows:

Q. Why did this break?

A. Simply because there were defective ties there.

Q. That is the fact, the ties were defective?

A. It couldn't have been otherwise; the ties broke.

Other testimony in this regard shows that this road was used continuously until late in August.

This was not an ordinary railroad, but a logging road. They were putting this so-called temporary track to practically the same use that they were any other part of the track. They were hauling just as heavy trains on this as on any other portion of the road. The defendant's road is a logging road, and the quibble in regard to this instruction on behalf of counsel for defendant, as heretofore said, is a mere matter of words. It recalls the observation of a noted English lawyer, Sir William Erle, who, speaking of certain lawyers, said: Their education is such "they are immersed in a world of words; * * so accustomed to deny what they believe to be true, to defend what they believe to be wrong, to look for premises, not for conclusions, that they lose the sense of true and false, i. e., real and unreal."

It is easy to call this portion of the road "temporary." The fact is the law requires the use of ordinary care; that is, such care as a person of ordi-

nary prudence would use in the conduct of his business. It is no excuse for one to say that, in part of his business, he uses ordinary care; he must use such care in all departments of his business; such an excuse is not applicable to the defendant in this case. The particular part of the road upon which the plaintiff was injured was the very portion of the road where the defendant was doing its principal business. It was getting out logs on its train. It may be called temporary, but that could not be used in this case, in the sense which counsel seeks to use it, because the very business in which the defendant is engaged, might be called temporary. It only continues until the timber is used up and then it will cease. In this instance the defendant had to use and operate its road at the place of the accident some four months. This accident occurred a little after 8 o'clock, and it was the second train. Therefore they run at least 10 or 12 trains a day on this road, and the timber was sufficient to keep running for some four months. Now it is admitted on behalf of the plaintiff that it was the duty of defendant, in the instruction requested, to construct this road so that it was reasonably safe for the purposes for which it was used, and to use ordinary care in its maintenance. If this word "temporary" may be applied to this road, it could equally well be applied to trains, cars and employees. The rule laid down by the court includes the entire business in which the master is engaged; includes all the facili-

ties which he uses in the conducting of his business. It says that in the conducting of his business he owes a duty to the employee to use ordinary care to furnish him reasonably safe appliances in the performance of his work. If he fails to do so, and his failure is brought before the court for adjudication, the correct rule to be applied is, "Was this a part of the instrumentalities used by the defendant in the conducting of his business?" If so, it is the duty of the master, in such a case, to use ordinary care to see that the tools and machinery used by him, in the conducting of his business, are reasonably safe. A failure of the master in any department of his business to use ordinary care to furnish reasonably safe appliances is a breach of duty for which he must respond, in case an injury occurs to his employees as a result of a failure to perform that duty.

Eighth Assignment of Error. This instruction is as to the measure of damages, and the jury were told that if they found the issues for the plaintiff in the estimation of the damages they might take into consideration the extent and character of the plaintiff's injuries as shown by the evidence, the pain and suffering which the plaintiff had endured by reason thereof, and the loss of earnings thereby, and if they should find that the plaintiff was permanently injured they might consider such future pain, suffering and loss of earnings as would probably result from such injuries, and award plaintiff

such compensatory damages as under all the circumstances of the case they should deem just. This instruction certainly states the law, and we are unable to see what criticism can be made of it.

As to the other assignments of error and requests made by the defendant: The charge of the court has given the substance of each of these, in so far as they correctly state the rule applicable to cases of this kind. This is true of the 9th, 10th, 11th, 12th, 13th and 14th assignments.

COMMENTS ON PLAINTIFF'S BRIEF.

This brief starts out, in the first instance, to discuss the facts with an apology for so doing. The court is asked to review the fact as to whether or not the plaintiff was an employee as alleged in his complaint, or whether he was on the engine not as an employee, but merely at the invitation of the defendant. This was the principal controversal point at the trial of this case. Not only was the question presented to the jury by the defendant by denying the employment, but seven or eight witnesses, more or less, were called as to statements of plaintiff tending to negative his employment. The plaintiff was injured by having his foot crushed, so

that he was, as described by one of the witnesses (Record, page 129):

"The leg was cut off—this part of the leg was cut off right at the ankle joint, and the foot was turned just opposite from what it had ought to be, and the bones of this joint stuck out free from any flesh or anything, and the foot was just turned right backwards."

Record, page 143, another witness says: "His hands and legs and arms was badly scalded and he seemed to be in awful pain." His hands were so badly burned that the flesh came off. This was also true of his other leg, the flesh was so badly burned off that it had to be skin-grafted several times. The plaintiff also, after he was taken to the hospital, says (Record, page 63): "There is a place across my hips there where I laid on the log yet, a scar just about like this on my knee; and when I laid across the log it wrenched my back in a way that when they took me to the hospital they had to keep a rubber sheet on the bed for about six months. I couldn't retain my urine. And yet, when I exercise, I am weak, and nervous, and have to urinate every twenty minutes or half an hour; and I have lost all sexual vitality."

Again he says, on page 64: "The skin on my hands just rolled off, down in a bunch off of this hand, and this one was blistered all over, and my face was blistered and this arm was

blistered up to the elbow; and there is one place on the elbow that was bruised pretty bad. * * * And I was suffering just more than anyone could tell, unless they would have the experience. You couldn't explain it."

Q. What was done for you, do you know?

A. The first thing that I knew they done for me, they give me morphine down to the camp. I don't know what they done after that. They gave me chloroform, I understand, and I don't know just what did happen after they gave me the morphine.

Q. Were you suffering intense pain all this time?

A. Yes, sir; until I got the chloroform.

Q. Well, then, you became insensible, as I understand?

A. Yes, sir.

Yet notwithstanding the condition of the plaintiff, the defendant put on several witnesses, as shown in their brief, to testify to declaration of the plaintiff for the purpose of proving he was not on this engine as an employee. The plaintiff stated positively that he never made such declarations. That it would not have been true if he had made them, and in addition to that presented several witnesses that were with him constantly, who stated that no such declarations were made by him. Within a very short time after the accident he was

under the influence of morphine and chloroform and remained that way, and was concededly that way, when most of these alleged declarations were stated to have been made by him. The evidence of the plaintiff showed that he went up there expecting to be employed as an engineer on a donkey engine. It was shown (Record, page 148) that Ernest Floyd Grewell had been a fireman on this railroad engine for a month prior to this accident, and also, page 147, he says that he fired that locomotive during the year 1904, and the evidence shows that he had been fireman thereon continuously except for a short time in the autumn of 1904. The accident occurred on Sunday. Floyd Grewell fired this engine continuously up till Friday night. He was then ordered over on Saturday to fire plaintiff's donkey engine. So there had been a fireman continuously on that engine. The evidence shows that defendant was undertaking to make a record run on this day. The roll way where they were loading the logs on this train was nearly blocked, and at this particular time the plaintiff went down to where Stewart, the superintendent, was standing (see Exhibit 1, Record, page 429), and he ordered the plaintiff to go on the engine and fire. The plaintiff was at least the third extra man he had ordered to work that morning. Stewart, the superintendent, was standing near the en-

gine. There is no evidence or claim made by defendant that the plaintiff had been in the habit of riding on this engine or the train of the defendant before, and he went on at this time upon the direction of the superintendent, as a fireman. Not only this, but no less than three different persons testified that Stewart declared after this accident, that he had ordered the plaintiff on the engine to fire. Stewart was not only the actual, but was the acting superintendent at that time, and his authority as such is admitted in this record.

Apparently counsel seem to think that it is the duty of this court to revise this question of fact, which was submitted to the jury. If this were an open question for this court, and if this court could have seen the witnesses on the stand, heard their testimony, it would confirm the finding of the jury on this particular issue, because the evidence very greatly preponderates in favor of the plaintiff's contention. Not a single witness produced by the defendant could recollect any statement, declaration or conversation that occurred, except the single statement that plaintiff declared that his injury was the result of his own fault, or words to that effect. These declarations were manufactured, and no disinterested person who heard the testimony could arrive at any other conclusion.

Aside from this question of fact, the only other assignment that has any apparent seriousness is the Fifth: In this instruction the court says there is no evidence that the plaintiff assumed the hazzard of this defective roadway.

In the Texas Ry. v. Swearingen, 196 U. S. 51, on page 63, the court says that mere knowledge of a condition of affairs is not sufficient to show assumption of risk, and affirmed an instruction of the lower court wherein it was stated:

"In this connection you are further instructed that the mere fact that the plaintiff knew of the existence and location of the scale box would not, as a matter of law, charge him with knowledge of the danger," etc.

In the case of Chocklaw Ry. v. Holms, 191 U. S. 64, the court, after affirming the Archibold case, 170 U. S. 665, says: A servant is not required to use ordinary care to discover dangers, saying (quoting page 68): "Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employee."

In that case deceased, a brakeman, was killed by being struck by a water spout that was hanging slanting so that he came in contact therewith while he was on top of a car. In speaking of the affair the court affirmed the

following language of Judge Hammond: "It is so simple a task, one so devoid of all exigencies of expense, necessity of convenience, so free of any consideration of skill, except that of the foot rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakeman on the trains is a conviction of negligence."

In plaintiff's assignment there has been no attempt to comply with Rule 11 by quoting "the full substance of the evidence," showing that the plaintiff had any knowledge at all. In this brief the fact that the plaintiff ran a donkey engine more than a mile from this track and that he knew that it had been recently built, seems to constitute all the evidence there was, except something is said that he was up near this track on the morning of the casualty. His testimony in this regard is illustrated by defendant's Exhibit 1, Record, page 429. According to this diagram, he was not nearer than 10 or 12 steps to this road. He had no occasion to examine it, and says he did not examine it. He had no thought of going upon the engine until five minutes before he was injured, and he went on the engine at the direction of the superintendent to fire same. Even had he been on the track and looked at it, that would have been no evidence of assumption of risk. One of the witnesses (Record, page 144), in speak-

ing of the ties, said:

"They apparently looked good on the outside, but they were rotten on the inside."

Another witness stated (page 125):

"Where they had laid on the ground, the ties were rotten; the top of the ties were exceedingly sound, but the bottom of the ties, where they had laid on the ground, were rotten."

Henderson, the general manager, admits (page 231): "I found the ties broken square off. I found no rot, but evidently the ties were brittle." He further says (Record, page 236): That the cause of the accident was because the rail was laid on the ties inside of the stringer; that the ties were defective, but if the ties had been reasonably safe the accident would not have happened. He adds that the ties were brittle and defective, and as result of that the accident happened.

In the light of this evidence, if the defendant had proved, which it did not prove, that the plaintiff had looked at this road, that would have been no evidence sufficient for the court to submit the question of assumption of risk to the jury, because defendant would have had to go further. It would have been necessary for the defendant to show that the plaintiff had some knowledge of a railroad or given some facts which would at least tend to show

that the plaintiff not only saw this road, but appreciated the risk. The burden was on the defendant to show assumption of risk, and the mere seeing a condition of that kind, without further evidence of some sort tending to show that the plaintiff could appreciate the risk, would not be sufficient for a court to submit a question of that kind to a jury. However, the defendant did not even show that the plaintiff saw this road. In fact, there is no testimony except that he was running a donkey engine a mile or more away from it. Certainly that would be no evidence of knowledge on his behalf. THERE IS AN IMPLIED WARRANTY THAT THE MASTER HAS FURNISHED EQUIPMENT REASONABLY SAFE FOR THE PURPOSES FOR WHICH IT IS TO BE USED. On the other hand, there was an absolute warranty on behalf of the defendant that this road was reasonably safe for the purposes to which it was put. The doctrine of the Federal Court is (Archibold's case, 170 U. S. 665; McDade's case, 191 U. S. 63; Swearingen's case, 196 U. S. 51; Holmes' case, 202 U. S. 438), that an employee is not required to use ordinary care or any care to discover defects in the master's appliances. On the contrary, he has the absolute right to rely upon the assurance that when he is set to work the appliances with which he

is to work are reasonably safe for the purposes to which they are used. The responsibility is upon the master to furnish such appliances, and the employee is not required to investigate. He is not required to look. He has a right to take these appliances in their apparent condition and use them without investigation, and under such circumstances he only assumes such risks as are ordinarily incident to his employment, barring such glaring defects, as was said in the Johnson's case, 23 Oregon, 94, s. c. 31 Pac. 286, viz.:

"An open and visible risk is such as would in an instant appeal to the senses of an intelligent person (Wood, Mast. & S. 763.) It is one so patent that a person familiar with the business would instantly recognize it. It is a risk about which there could be no difference of opinion in the minds of intelligent persons accustomed to the service."

DEFENDANT APPARENTLY EXPECTED THE PLAINTIFF TO ASSUME THAT THE ROADWAY CONSTRUCTED BY THEM WAS A DEATH-TRAP.

The claim of the defendant is that this roadway was built in the ordinary way and was safe. Brief, page 47 and page 51, it seems to be claimed that the road was reasonably safe. On the other hand, it is claimed that the plaintiff should have seen, or if he did not see he ought

to have known (as he run a donkey engine a mile away and knew that the road was new) that the road was unsafe. The doctrine of the assumption of risk is that the appliances are not safe, not those in ordinary use, and therefore the accident is liable to happen.

In the Austin case, 40 Mich. 247, cited by defendant, a switchman riding in a yard on a narrow switchboard of the switch engine, holding on to a hand-bar, whereupon "he let go this bar to shift hands in holding his lantern." He was jolted off the engine and was injured. The engine did not leave the track. Nothing happened except the switchman fell and was injured under the circumstances stated.

In the Wade case, 75 Fed. 517, cited by defendant, it was sought to recover from a private logging road for the death of the deceased, whom it was claimed was a passenger. The court left the case to the jury, but instructed the jury that the defendant was a private carrier, and the rules covering a common carrier of passengers did not apply. It is difficult to see how that case can have any reference or relation to the case at bar.

In the Demko case, 136 Fed. 162, cited by defendant, the plaintiff was injured while riding in a place where he was directed not to be, and had been instructed to ride in the cab of the engine. If he had been there he would not

have been injured. The court held that this constituted contributory negligence. There is no such question involved in the case at bar.

CONCLUSION.

In this case the defendant was injured as a result of a defective roadway which the defendant admits was defective. The evidence does not show that it had been built for some time and had become defective from use. The defense admits that every allegation made in regard to this defective road is true. The rails were laid so that they came inside of the stringers. They were laid on defective ties. The engine went through and the plaintiff was badly injured. At the time of his injury he was a young man 25 years of age, strong and healthy. As a result of this injury he not only lost his leg, but he was otherwise badly injured. By his injuries he is deprived from all sexual vitality. It is inconceivable how responsibility under such circumstances can be denied. The whole make-up of the defendant's brief indicates that this is one of the appeals which this court, when it adopted Subdivision 2, Rule 30, intended to prevent. If it be possible that that rule may apply to a personal injury case, it seems to me that it should apply to this case. In most of

the cases where the defendant's requests were not given, they were given fully and completely in the court's general charge. (Record, page 401.) In neither the assignments of errors or in defendant's brief is this fact alluded to, but they are presented precisely and in the same way that all other assignments are made.

The verdict in this case is not excessive, and had it been twice the amount it is, it would not have been excessive. That question, like the question of fact, is one upon which the jury passed and its verdict is final. The plaintiff therefore requests that the judgment of the lower court in this case be affirmed.

Respectfully submitted,

THOS. O'DAY,

Attorney for Defendant in Error.